V. B. Fabricators, Inc. *and* United Steelworkers of America, AFL-CIO-CLC. Case 6-CA-16270(E)

15 August 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 11 April 1984 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Applicant filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application of V. B. Fabricators, Inc., Glenshaw, Pennsylvania for attorney's fees and expenses under the Equal Access to Justice Act is denied.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

THOMAS R. WILKS, Administrative Law Judge. This case now comes before me on application for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 (EAJA) and Section 102.43 et seq. of the Board's Rules and Regulations.

On January 27, 1984, I issued a Decision and Order recommending the underlying complaint in this case be dismissed which the Board adopted in its entirety by Decision and Order of March 8, 1984, in the absence of exceptions.

On March 1, 1984, Respondent filed with the Board an application for award of attorney's fees and expenses pursuant to the EAJA and Section 102.43 et seq. of the Board's Rules and Regulations. On March 12, 1984, the Board referred this application to the administrative law judge for appropriate action. Thereafter, on March 21, 1984, the General Counsel filed a motion to dismiss Respondent's application. On March 26, Respondent filed a response to motion to dismiss. For the reasons stated below, Respondent's application is denied.

The General Counsel's motion to dismiss is premised primarily on an argument that the General Counsel was substantially justified in issuing the complaint. Secondarily, the General Counsel argues that Respondent is not entitled to fees incurred prior to the date of the issuance of the complaint. Respondent argues that the General Counsel's answer is improper because it attached a copy of a letter purportedly served by Respondent on the General Counsel during the investigation of the case wherein Respondent refused to cooperate with the investigation. Respondent argues that the General Counsel be ordered to file an appropriate answer excising what it contends is not properly part of the record. I find it unnecessary to resolve the issue of whether or not that letter ought to be excised because my ultimate decision is not affected by the existence or nonexistence of such a letter, and it would be too time-consuming and nonproductive to order a refiling of an answer.

Respondent raises several procedural arguments as to whether or not the General Counsel appropriately raises the issue of substantial justification by way of a motion to dismiss. With some cogency, Respondent argues that there is only one issue to resolve and that is the issue of substantial justification. It argues that the General Counsel appears to be attempting to file two "answers," and urges that the General Counsel's motion to dismiss be treated as an answer in order to expedite the proceeding and eliminate unnecessary costs.

In agreement with Respondent, I conclude that the argument of substantial justification constitutes an affirmative defense which runs to the merit of the claim. In further agreement with Respondent, I conclude that it would unnecessarily compound the expenses of this proceeding to dismiss the motion and to direct an answer. Rather, I will construe the General Counsel's motion to constitute its answer. However, contrary to Respondent, I conclude that the General Counsel must prevail in its affirmative defense of substantial justification.

Section 504(a)(1) of the EAJA provides that an award shall be made unless the position of the agency as a party to the proceeding was substantially justified or special circumstances make an award unjust. The Board has stated that the legislative history characterized "substantially justified" as a test of reasonableness and that where the "Government can show that it had reasonable basis, both in law and fact, no award will be made.[1] The burden of proof that the Government's position was substantially justified rests with the General Counsel. However, unreasonableness is not necessarily presumed by the loss of the Government's case, nor does "substantial justification" presuppose that the Government's decision to litigate was premised on a substantial probability of prevailing.[2] Furthermore, the establishment of a prima facie case is not deemed by the Board to be a prerequisite to reasonableness in law and fact.[3] The statutory exception of "special circumstances" was intended to allow the Government to advance "in good faith the novel but credible extensions and interpretations of the law that

[1] *Enerhaul, Inc.*, 263 NLRB 890 (1982), revd. 710 F.2d 748 (11th Cir. 1983). The court held that the General Counsel was not substantially justified in fact or law as held by that circuit, notwithstanding supporting Board precedent. There is no contention herein that General Counsel's position was in clear contravention of precedent peculiar to this circuit.

[2] S. Rep. No. 96-253, 96th Cong., 1st Sess. 6-7, 14-15 (1979); H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11 (1980), *Spencer v. NLRB*, 715 F.2d 539 (D.C. Cir. 1983).

[3] *Enerhaul*, supra, *Jim's Big M*, 266 NLRB 665 fn. 1 (1983).

often underlie vigorous enforcement efforts," and to litigate a "close question of law or fact."[4]

My decision in the instant case was premised on a resolution of credibility between the General Counsel's witness and Respondent's witnesses, i.e., whether the participants in contract negotiations had agreed on a final and binding collective-bargaining agreement, or whether employee ratification of the collective-bargaining agreement had been made a precondition to such agreement. That determination required an analysis of the testimony of the witnesses, i.e., direct and cross-examination as well as consideration of their demeanor which as I stated in the decision "tips the balance" in favor of Respondent's witnesses. It did not appear from the face of documentary evidence alone, or form pretrial affidavits, that the General Counsel's witness was inherently unbelievable. Therefore, assuming that Respondent had cooperated with the investigation of this case and had submitted contradictory affidavits, it is clear that a resolution of credibility in an ex parte manner by the General Counsel would not be feasible.

In view of the foregoing analysis, I cannot find that the General Counsel was not substantially justified in going forward with this matter. It is therefore not necessary to consider the General Counsel's secondary argument as to precomplaint fees.[5]

ORDER

It is hereby ordered that the application be dismissed.

[4] S. Rep. 96-253, supra, at 7; H. Rep. 96-1418, supra; 126 Cong.Rec. H10226 (daily ed., October 1, 1980).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.